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INSIGHTS

EPA and Army Say they are Staying in the Comfort Zone with the Proposed Revision to the Definition of "Waters of the United States"

November 22, 2021

*By: **Ann D. Navaro** and **Sara M. Burgin***

On November 18, 2021, EPA and the Department of the Army released their anticipated proposed revision to the definition of "waters of the United States" (WOTUS) – which phrase governs the geographic reach of the Clean Water Act (CWA). Public hearings will be held in January.

The proposal lands in the shifting sands of litigation that have swirled around the CWA for decades. At the end of August a District Court judge in Arizona vacated the Trump rule which was being implemented nationwide. The federal agencies interpreted that vacatur as nullifying the rule nationwide and CWA jurisdiction changed overnight – going back to the 1986 definition of WOTUS as implemented by the agencies based on guidance issued following the Supreme Court's 2006 *Rapanos* decision. The sudden reversion had real on-the-ground consequences for an array of stakeholders who made personal and commercial decisions based on the Trump version of WOTUS which had codified a narrower interpretation of WOTUS.

Now, the agencies explain that they are proposing to, essentially, codify the current approach – sticking with a framework that is familiar to the private sector and to field personnel in the EPA and in the U.S. Army Corps of Engineers, the latter of whom implement the CWA Section 404 permit program on a daily basis. Because ongoing litigation could bring back the Trump-era rule (which advanced a narrower interpretation in significant respects), they propose to codify the post-*Rapanos* approach. The agencies characterize this proposal as advancing the agencies' goals of "quickly and durably protecting the nation's waters." Nonetheless, EPA has stated that it intends to make another run at regulatory novelty in the future – pursuing a second phase rulemaking that builds on this foundation.

What WOTUS will include: Under the proposed rule WOTUS would include: traditional navigable waters (TNWs), interstate waters, territorial seas, and their adjacent wetlands; impoundments of WOTUS; tributaries to TNWs, interstate waters, and territorial seas, and impoundments of those tributaries that are either "relatively permanent" or have a "significant nexus" to TNWs; wetlands adjacent to impoundments and tributaries, that are "relatively permanent" or have a "significant nexus;" and "other" waters that are either "relatively permanent" or have a "significant nexus."

The "relatively permanent" category means "waters that are relatively permanent, standing or continuously flowing and waters with a continuous surface connection to such waters." The "significant nexus" qualifier means "waters that either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, interstate waters, or the territorial seas."

There are differences with the current regime, however. Note one meaningful change from the 1986 definition – the "other waters" category, a category grounded in the 1986 definition, would now be tied to the "relatively permanent" and "significant nexus" inquiries rather than the traditional requirement that to be jurisdictional, such waters had to have a tie to interstate or foreign commerce.

What WOTUS will not include: Also consistent with past and current practice, the proposed rule would exclude prior converted cropland and wastewater treatment systems from jurisdiction. However, consistent with longstanding practice, upstream waters from a waste water treatment system would remain jurisdictional.

As for ditches, the agencies would continue to take the position that certain types of ditches are not jurisdictional -- ditches excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.

In addition, the agencies acknowledge limits on their authority under the CWA and "agree" that the limit "should relate to the 'significant effects' of or 'significant nexus'" with TNWs, interstate waters, and territorial seas. In particular, the agencies acknowledge limits on potential regulation of non-navigable, isolated, and intrastate waters –many argued that those limits were pushed beyond the breaking point by the 2015 WOTUS rule. Given that the agencies have forecast additional regulatory change, the nature of these "agreed" limits remains to be seen.

Questions on implementation:
The proposal seeks comment on various questions related to implementation, including:

- Should the agencies retain the current examples of "other waters" that may be jurisdictional (e.g., mudflats, sloughs, natural ponds) or remove the list so that jurisdiction is based on the "relatively permanent" and "significant nexus" qualifiers without further elaboration?

- Should the agencies interpret "similarly situated" consistently with the current approach or change it to more broadly cover "waters that are providing common, or similar, functions for downstream waters such that it is reasonable to consider their effects together."

- What approach should the agencies take to addressing a significant nexus analysis for "other waters"? One approach would require additional approval process prior to the assertion of jurisdiction since taking jurisdiction over "other waters" may edge towards the limits of CWA authority.

Final observations:
This proposal is not the Obama-era 2015 rule. Amongst other differences, that rule established

categories of waters that presumptively had a "significant nexus" with TNWs, such as waters within 4,000 feet of the of the Ordinary High Water Mark, and waters that were presumptively "similarly situated" for purposes of jurisdiction. The 2015 rule included such waters as prairie potholes and western vernal pools, waters that critics noted are generally isolated from TNWs. In contrast, this new proposal favors more limited categories of presumptively jurisdictional water and the need for fact-specific "significant nexus" analyses in other situations.

On the one hand, the proposed rule will find no support amongst certain factions – it will be criticized for not going far enough by some and others will argue it goes too far by sweeping in waters categorically excluded under the Trump rule, such as some ephemeral waters. On the other hand, it has the benefit of support in Supreme Court precedent and substantial on-the-ground experience – a potential boon for both the goals of the CWA and predictability.